Waris Selesa Sdn Bhd v Tradelift Indopalm Industries Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCC)(A)-1657–08 OF 2017 AND W-02(IM)(NCC)-1103–06 OF 2017

ROHANA YUSUF, HARMINDAR SINGH AND HANIPAH FARIKULLAH JJCA

7 JANUARY 2019

Civil Procedure — Jurisdiction — Civil jurisdiction of High Court — Appellant wound up by High Court at Kota Kinabalu — Respondent commenced originating summons at High Court of Malaya — Whether High Court of Malaya had jurisdiction to hear originating summons — Whether originating summons ought to be instituted in High Court of Sabah and Sarawak — Courts of Judicature Act 1964 s 23(1)

Companies and Corporations — Winding up — Disposition of property — Payment of rentals and forfeiture of deposits to appellant — Whether payments of rentals and forfeiture of deposits subsequent to winding up was contrary to s 223 of the Companies Act 1965 — Companies Act 1965 s 223

The respondent ('plaintiff') and the appellant ('defendant') had on 14 June 2007 executed a management agreement pursuant to which the plaintiff operated, maintained and managed a palm oil mill ('the mill'). On 13 June 2014, the defendant was wound-up by the High Court at Kota Kinabalu pursuant to a petition filed by the plaintiff. Dato' Chong Kwong Chin ('Dato' Chong') was appointed as the liquidator for the defendant and he appointed the plaintiff to continue to operate the mill pursuant to a tenancy agreement dated 16 May 2014 ('the tenancy agreement'). However, by a notice dated 26 June 2015, Dato' Chong terminated the tenancy agreement and the management agreement on the basis of the plaintiff's alleged default in ensuring rental payments for the period from November 2014–June 2015. Dato' Chong also forfeited the deposits paid towards the outstanding rentals. Pursuant to an order dated 25 February 2016 pronounced by the Muar High Court, the plaintiff was ordered to be wound up and joint liquidators were appointed. Given that the defendant had been wound up by the High Court at Kota Kinabalu, the plaintiff obtained leave to bring the action against the defendant on 20 December 2016 from the High Court of Sabah and Sarawak at Kota Kinabalu. In the present originating summons ('OS'), the plaintiff sought to make a claim for monies in the sum of RM831,333.33 it alleged to have been appropriated by the defendant in violation of s 223 of the

Companies Act 1965 ('the CA'). By encl 6, the defendant had applied to strike out the plaintiff's OS under O 18 r 19 of the Rules of Court 2012. The learned High Court judge had allowed the plaintiff's claim and dismissed the defendant's application on the ground that the High Court of Malaya at Kuala Lumpur instead of the High Court of Sabah and Sarawak had the jurisdiction to hear the OS filed by the plaintiff. Hence, these appeals. The issues for consideration were: (a) whether the High Court of Malaya had jurisdiction to hear the OS or whether the OS ought to be instituted in the High Court of Sabah and Sarawak; and (b) whether the payments of the rentals and the forfeiture of deposits subsequent to the winding up of the plaintiff was contrary to s 223 of the CA.

Held, dismissing the appeals and affirming the decision of the High Court:

(1) The reasons given by the learned judge were sound and in harmony with s 258(2) of the CA. Further, the learned High Court judge had correctly identified that the High Court of Malaya was the correct jurisdiction because the same fulfilled the requirement of limb (a) of s 23(1) of the Courts of Judicature Act 1964 in respect of the question where the cause of action arose. The disputed sums of monies which established the cause of action in the OS, arose in Kuala Lumpur for payment of these monies were made by the plaintiff, an entity which at all materials times had its registered address in Muar, Johor and where the plaintiff's joint liquidators' offices were also located in Kuala Lumpur. Given that the impugned payments of the sums of monies occurred in the territory of West Malaysia by reason of first, the place of business and residence of party making the payments being in Johor and Kuala Lumpur and secondly, Dato' Chong was in Kuala Lumpur and the fulfilment of the requirements of Form 75 were also performed in Kuala Lumpur, it was clear that the cause of action could not have been more correctly or conveniently commenced in the High Court of Malaya, specifically in Kuala Lumpur (see paras 27–28, 32 & 34).

(2) At the time of receipt of the rentals and forfeiture of the deposits, the tenancy agreement had already been terminated and the plaintiff at all material time had no other business. Therefore, the said settlement of the rentals and forfeiture of the deposits could not be said to be necessary for the plaintiff's continuation of business which would benefit its general body of creditors. Given that the forfeiture of the rental deposit and the payment of the rentals were made after presentation of a winding up petition, it would be a 'disposition' within s 223 of the CA. Since there was no application from the defendant for a validation order under s 223 of the CA, that remittance of RM831,333.33 to the defendant after the presentation of the petition of winding up, was void (see paras 48, 51 & 56).

A **[Bahasa Malaysia summary**

Responden ('plaintif') dan perayu ('defendan') pada 14 Jun 2007 telah memeterai perjanjian pengurusan yang berdasarkannya plaintif mengendali, menyelenggara dan menguruskan kilang kelapa sawit ('kilang'). Pada 13 Jun
B 2014, defendan digulung oleh Mahkamah Tinggi di Kota Kinabalu berdasarkan petisyen yang difailkan oleh plaintif. Dato' Chong Kwong Chin ('Dato' Chong') dilantik sebagai pelikuidasi bagi defendan dan beliau melantik plaintif untuk terus mengendalikan kilang tersebut berdasarkan perjanjian penyewaan bertarikh 16 Mei 2014 ('perjanjian penyewaan'). Namun, melalui
C notis bertarikh 26 Jun 2015, Dato' Chong menamatkan perjanjian penyewaan dan perjanjian pengurusan atas alasan dakwaan ingkar plaintif dalam memastikan pembayaran sewa untuk tempoh dari November 2014–Jun 2015. Dato' Chong juga merampas deposit yang dibayar untuk sewaan tertunggak. Mengikut perintah bertarikh 25 Februari 2016 yang diputuskan oleh
D Mahkamah Tinggi Muar, plaintif diperintahkan untuk digulung dan pelikuidasi bersama telah dilantik. Oleh kerana defendan digulung oleh Mahkamah Tinggi di Kota Kinabalu, plaintif memperoleh kebenaran memulakan tindakan terhadap defendan pada 20 Disember 2016 dari Mahkamah Tinggi Sabah dan Sarawak di Kota Kinabalu. Dalam saman
E pemula ('SP') ini, plaintif memohon untuk membuat tuntutan wang sejumlah RM831,333.33 yang didakwa telah diperuntukkan oleh defendan yang melanggar s 223 Akta Syarikat 1965 ('AS'). Melalui lampiran 6, defendan telah membuat permohonan untuk membatalkan SP plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012.

F

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Alasan yang diberikan oleh hakim yang bijaksana adalah tepat dan selaras dengan s 258(2) AS. Selanjutnya, hakim Mahkamah Tinggi yang
G bijaksana telah dengan betul mengenal pasti bahawa Mahkamah Tinggi Malaya adalah bidang kuasa yang betul kerana perkara itu memenuhi syarat cabang (a) s 23(1) Akta Mahkamah Kehakiman 1964 berkenaan dengan persoalan di mana kausa tindakan terakru. Jumlah wang yang dipertikaikan yang menjadi penyebab tindakan dalam SP, timbul di
H Kuala Lumpur kerana pembayaran wang tersebut dibuat oleh plaintif, sebuah entiti yang pada setiap masa mempunyai alamat berdaftar di Muar, Johor dan pejabat pelikuidasi plaintif juga terletak di Kuala Lumpur. Memandangkan bahawa pembayaran sejumlah besar wang yang berlaku adalah di wilayah Malaysia Barat dengan alasan pertama,
I tempat perniagaan dan tempat tinggal pihak yang membuat pembayaran adalah di Johor dan Kuala Lumpur dan kedua, Dato' Chong berada di Kuala Lumpur dan kepenuhan syarat Borang 75 juga dilakukan di Kuala Lumpur, jelas bahawa kausa tindakan tidak dapat dimulakan dengan lebih tepat atau mudah di Mahkamah Tinggi Malaya, khususnya di

Kuala Lumpur (lihat perenggan 27–28, 32 & 34).

(2) Pada masa penerimaan penyewaan dan rampasan deposit, perjanjian penyewaan telah ditamatkan dan plaintif sepanjang waktu material tidak mempunyai perniagaan lain. Oleh itu, penyelesaian penyewaan dan rampasan deposit tersebut tidak boleh dikatakan diperlukan untuk meneruskan perniagaan plaintif yang akan memanfaatkan anggota am pemiutangnya. Memandangkan rampasan deposit penyewaan dan pembayaran penyewaan dibuat setelah pengemukaan petisyen penggulungan, ia akan menjadi 'pelupusan' dalam s 223 AS. Oleh kerana tidak ada permohonan daripada defendan untuk perintah pengesahan di bawah s 223 AS, pengembalian wang sebanyak RM831,333.33 kepada defendan setelah pengemukaan petisyen penggulungan, adalah terbatal (lihat perenggan 48, 51 & 56).]

Cases referred to

Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd [1990] 1 MLJ 191, HC (refd)
Fung Beng Tiat v Marid Construction Co [1996] 2 MLJ 413, FC (refd)
Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd [1990] 3 MLJ 309; [1990] 2 CLJ Rep 253, HC (refd)
Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449; [1988] 2 MLJ 449, SC (refd)
NZ New Image Sdn Bhd v Loh Yok Liang [2016] MLJU 1768; [2016] CLJ 474, CA (refd)
Savant-Asia Sdn Bhd v Sunway PMI-Pile Contruction Sdn Bhd [2009] 5 MLJ 754; [2008] 6 CLJ 681, FC (refd)
Syarikat Nip Kui Cheong Timber Contractor v Safety Life And General Insurance Co Sdn Bhd [1975] 2 MLJ 115 (refd)
Tan Keen Keong v Tan Eng Hong Paper & Stationary Sdn Bhd & Ors [2012] 3 MLRA 594, CA (refd)
Tan Kah Hoe & Anor v Budaya Adil Sdn Bhd [2000] 7 MLJ 530; [1999] 4 CLJ 759, HC (refd)
Tenaga Gagah Sdn Bhd v Saik Siw Lai & Ors and another appeal [2016] 4 MLJ 194; [2016] 7 CLJ 182, CA (refd)
The Ayer Molek Rubber Company Bhd v Bintang-Bintang Sdn Bhd [2013] 4 MLJ 401; [2013] 4 CLJ 820, CA (refd)
Wong Wee Kheong & Anor v Daya Bersama Sdn Bhd [2013] 3 MLJ 313; [2013] 3 CLJ 969, FC (refd)
Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in liquidation) [2011] 4 MLJ 161; [2011] 6 CLJ 47, CA (refd)

Legislation referred to

Companies Act 1965 ss 219(2), 223, 239, 258(2)
Companies Regulations 1966 Form 75
Courts of Judicature Act 1964 s 23(1), (1)(a), (1)(b)

A Federal Constitution art 121
Rules of Court 2012 O 18 r 19

Appeal from: Originating Summons No WA-24NCC-17–01 of 2017 (High Court, Kuala Lumpur)

B *Malik Imtiaz Sarwar (Surendra Ananth and Harleen Kaur with him) (Jeeva Partnership) for the appellant.*
Michael Chow Keat (Simon Hong and Michelle Yoong with him) (Simon Hong) for the respondent.

C **Hanipah Farikullah JCA:**

INTRODUCTION

D **[1]** There are two appeals before us as follows:

(a) Civil Appeal No W-02(IM)(NCC)-1103–06 of 2017 ('Appeal 1103'); and

(b) Civil Appeal No W-02(NCC)(A)-1657–08 of 2017 ('Appeal 1657').

E

[2] These appeals arise from the decisions of the learned High Court judge given in the High Court at Kuala Lumpur dismissing the defendant's application to strike out the plaintiff's originating summon ('OS') under O 18 r 19 of the Rules of Court 2012 ('the ROC 2012') and allowing the claim by the plaintiff for restitution of monies under s 239 of the Companies Act 1965 ('the CA').

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[3] By consent of all parties, we heard both appeals together as it involved similar facts.

G

[4] For convenience, we will refer to the parties in this judgment as they were referred to in the High Court. At the conclusion of the hearing we unanimously allowed it with costs. We now give our reasons for so deciding.

H

THE BACKGROUND FACTS

[5] The background facts have been well set out in both the judgments of the learned High Court judge. We will only repeat in the following paragraphs the relevant facts as narrated by the learned judge in so far as they are relevant to the issues which arise for decision in these appeals.

I

[6] The defendant is a company incorporated in Sabah. On 13 June 2014, the defendant was wound up by the High Court at Kota Kinabalu pursuant to

a petition filed by the plaintiff. Dato' Chong Kwong Chin ('Dato' Chong') was appointed as the liquidator for the defendant on the same day.

[7] Pursuant to an order dated 25 February 2016 pronounced by the Muar High Court in Petition No 28NCC-24–05 of 2015 presented by Kemajuan Tanah Jujur Sdn Bhd on 25 May 2015, the plaintiff was ordered to be wound up and Ng Pyak Yeow ('Ng') and Venkiteswaran Sankar ('Venki') were appointed as the joint liquidators of the plaintiff.

[8] Given that the defendant had been wound up by the High Court at Kota Kinabalu, the plaintiff obtained leave to bring the action against the defendant on 20 December 2016 from the High Court of Sabah and Sarawak at Kota Kinabalu vide Petition No BKI-28NCC-10/4 of 2014.

[9] The plaintiff and the defendant had earlier on 14 June 2007 executed a management agreement pursuant to which the plaintiff operated, maintained and managed a palm oil mill known as Kilang Sawit Waris Selesa ('the milll') located at Lahad Datu, Sabah ('the management agreement').

[10] Following the winding up of the defendant on 13 June 2014, Dato' Chong as liquidator appointed the plaintiff to continue to operate the milll pursuant to a tenancy agreement dated 16 May 2014 ('the tenancy agreement').

[11] However, by a notice dated 26 June 2015, Dato' Chong terminated the tenancy agreement and the management agreement on the basis of the plaintiff's alleged default in ensuring rental payments for the period from November 2014–June 2015. Dato' Chong also forfeited the deposits paid towards the outstanding rentals.

[12] In the present OS, the plaintiff seeks to make a claim for monies in the sum of RM831,333.33 it alleged to have been appropriated by the defendant in violation of s 223 of the CA. The basis of the allegation was that the said monies were received and retained by the Dato' Chong as the liquidator of the defendant subsequent to the presentation of the petition to wind up of the plaintiff.

[13] By encl 6, the defendant had applied to strike out the plaintiff's OS under O 18 r 19 of the Rules of Court 2012. The learned High Court judge had dismissed the defendant's application on the ground that the High Court of Malaya at Kuala Lumpur instead of the High Court of Sabah and Sarawak has the jurisdiction to hear the OS filed by the plaintiff. The learned High Court judge relied on s 23(1)(a) and (b) of the Courts of Judicature Act 1964 ('the CJA') and the case of *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990]

A 1 MLJ 191 and *Fung Beng Tiat v Marid Construction Co* [1996] 2 MLJ 413.

Appeal 1103

B **[14]** The issue in this appeal is whether the High Court of Malaya has jurisdiction to hear the OS or whether the same ought to be instituted in the High Court of Sabah and Sarawak.

C **[15]** By encl 6, the defendant had applied to strike out the plaintiff's OS under O 18 r 19 of the RC. The learned High Court judge had dismissed the defendant's application on the ground that the High Court of Malaya at Kuala Lumpur instead of the High Court of Sabah and Sarawak has the jurisdiction to hear the OS filed by the plaintiff. The learned High Court judge relied on s 23(1)(a) and (1)(b) of the CJA and the case of *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 1 MLJ 191 and *Fung Beng Tiat v Marid Construction* D *Co* [1996] 2 MLJ 413.

[16] The learned High Court judge began his analysis by referring to s 23(1) of the CJA. In his view, various limbs of s 23(1) of the CJA, four in total, are to E be read disjunctively, given the grammatical conjunction 'or'. The learned High Court judge stated that he agreed with the defendant's argument that limb (b) of s 23(1) of the CJA applied on consideration of locality of the place of business or residence was not erroneous. However, the learned judge found that the defendant's argument failed to consider the fact that the defendant has F been wound up and the appointed liquidator of the defendant, Dato' Chong resides and maintains his place of business not in Sabah, but in Kuala Lumpur.

[17] The learned judge correctly explained that the purpose of s 23(1)(b) of the CJA is to ensure that the relevant parties envisaged to be involved in any G legal proceedings are not to be required to attend the same beyond the territorial jurisdiction of the place where the parties are residing or conduct business.

H **[18]** The learned High Court judge states at the conclusion of his judgment in the following:

> The impugned payments of the sums of monies occurred in the territory of West Malaysia by reason of first, the place of business and residence of party making the payments being in Johor and Kuala Lumpur (of the Plaintiff and its joint I liquidators, respectively) and secondly, that of the party receiving the monies, DC, as the liquidator of the Defendant is in Kuala Lumpur, and coupled with the key fact that the subsequent fulfilment of the requirements of Form 75 were also performed in Kuala Lumpur, in the High Court of Malaya, specifically, in Kuala Lumpur.

[19] Before us, the main thrust of the contention of the defendant's learned counsel was that the High Court fell into error in failing to consider that the High Court of Malaya is not the right forum or the forum of convenience to commence this action or that the High court of Malaya does not have the necessary jurisdiction to hear this action.

[20] It was submitted for the defendant that since the defendant company has its registered office in Kota Kinabalu Sabah, the present OS fall, within the scope of s 23(1)(b) of the CJA. Therefore, the defendant argued, the High Court of Sabah and Sarawak has the jurisdiction to hear the OS.

[21] On the contrary, learned counsel for the plaintiff took the position that the OS is not concerned with the question on the validity of termination of the agreements, but instead, it seeks to determine whether payments made to the liquidator was lawful in the context of s 223 of the CA. In refuting the defendant's position, it was submitted for the plaintiff that the learned High Court judge was correct when he held that by reason of the payments and receipts having taken place in Kuala Lumpur, the High Court of Malaya at Kuala Lumpur could also be justified as the correct forum under s 23(1)(a) of the CJA. Following this section the basis of jurisdiction being '*the facts on which the proceedings are based* exist at Kuala Lumpur'.

[22] We have read the appeal records and the judgment of the High Court judge. We have also considered the written and oral submissions of both the parties.

[23] For proper determination of this issue, it is clear from art 121 of the Federal Constitution that there are two separate High Courts in Malaysia exercising distinct territorial jurisdiction over different geographical areas of the country. There is the High Court in Malaya and there is the High Court of Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory.

[24] Referring to the case of *Syarikat Nip Kui Cheong Timber Contractor v Safety Life And General Insurance Co Sdn Bhd* [1975] 2 MLJ 115, this court in the case of *Fung Beng Tiat v Marid Construction Co* [1996] 2 MLJ 413 held as follows:

> It is also too clear that both the High Court in Malaya and the High Court in Borneo have separate and distinctive territorial jurisdiction. art 121(1) of the Constitution speaks of the two High courts having 'co-ordinate jurisdiction' and the definition of 'local jurisdiction' in the Courts of Judicature Act 1964 speaks of the territorial jurisdiction of each two High Courts. Section 7(2) of the 1964 Act should not be misconstrued for what that subsection does is simply to get around the provision of O 11 Rule 1 of the Rules of the Supreme Court 1957 for convenience

for otherwise unnecessary difficulties will arise in the process of the courts within Malaysia. The enactment of s 7(2) of the 1964 Act itself would strengthen the argument that the framers of the 1964 Act recognises the distinctive territorial jurisdiction of the two High Courts in Malaysia.

[25] In order to understand the basis of the learned High Court judge reasoning it is convenient at this stage to refer to s 23 of the CJA which provides as follows:

> 23 Civil jurisdiction — General
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> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
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> (a) the cause of action arose;
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> (b) the defendant or one of several defendants resides or has his place of business;
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
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> (d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.
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> (2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

[26] In his judgment, the learned High Court judge specifically acknowledged the importance of the fact that the plaintiff had been wound up and its appointed liquidator, namely the Dato' Chong, resides and maintains a place of business in Kuala Lumpur. We are in agreement with the learned High Court judge in his analysis of s 23(1)(b) of the CJA to the facts of the present case. The learned High Court judge said:

(a) in a liquidation context, the most important party for the wound up entity is without any doubt, its liquidator. As such, the address of the liquidator cannot be excluded from the remit of limb (b) of s 23(1)(b) of the CJA. It should also be noted that whilst most of the cases dealing with this issue of jurisdiction concerned the filling of actions in personal and corporate insolvency matters, not unlike the instant OS, they are however mainly related the process prevailing at the stage prior to the winding up of the company or the bankruptcy of the individual;

(b) this thus provides further support to the view that upon the grant of a winding up order, the involvement of the liquidator who would now manage the affairs and business of the wound up company must be

given appropriate recognition. The place of business of the liquidator too is relevant, applicable and must be taken into account for purposes of s 23(1) of the CJA. This cannot be shown more clearly than the situation in the instant OS where the focus of the allegation giving rise to the OS is the very act of the liquidator Dato' Chong in having received the said sums of monies; and

(c) in my view, therefore, where any of the defendants referred to in s 23(1)(b) of the CJA has been wound up, the words 'place of residence or business' therein could also be extended to that of the liquidator of he said defendant.

[27] In our view, the reasons given by the learned judge are sound and in harmony with s 258(2) of the CA which provide that on the appointment of a liquidator all the powers of the directors shall cease except so far as the liquidator or the company in general meeting with the consent of the liquidator approves the continuance thereof. In this instant case, it is not disputed by the defendant, that the plaintiff's joint liquidators have not given their consent for the payment of the rentals and the forfeiture of the deposit to the defendant's company.

[28] Further, we find that the learned High Court judge had correctly identified that the other reason why the High Court of Malaya is the correct jurisdiction because the same fulfills the requirement of limb (a) of s 23(1) of the CJA in respect of the question where the cause of action arose.

[29] An important point to consider in this instant case is that the plaintiff's cause of action as embodied in the OS would clearly reveal that the crux of the action pertains to Dato' Chong's decision in having forfeited the deposits on 26 June 2015 and accepted the rentals between 6 June 2015 and 1 October 2015, namely after the petition to wind up the plaintiff had taken place. It is settled law that under s 219(2) of the CA 1965, the commencement of a winding up is on the date of the presentation of the petition (see *Savant-Asia Sdn Bhd v Sunway PMI-Pile Contruction Sdn Bhd* [2009] 5 MLJ 754; [2008] 6 CLJ 681 (FC); *Tenaga Gagah Sdn Bhd v Saik Siw Lai & Ors and another appeal* [2016] 4 MLJ 194; [2016] 7 CLJ 182 (CA); *Tan Keen Keong v Tan Eng Hong Paper & Stationary Sdn Bhd & Ors* [2012] 3 MLRA 594 (CA) and *Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in liquidation)* [2011] 4 MLJ 161; [2011] 6 CLJ 47 (CA)).

[30] It is clear that the present OS is not concerned with the validity of the termination of the agreements, but instead it seeks to determine whether the payments made to the liquidator of the defendant by the plaintiff was lawful in the context of, or in any manner caught by the provisions of s 223 of the CA.

[31] We find no merit in the defendant's argument that the cause of action arose in Sabah as the disputed sums of monies on the payments of rentals and utilities stemmed out of the management agreement of the milll which is indisputably located in Lahad Datu in the state of Sabah. And for those reasons falling within the territorial jurisdiction of the High Court of Sabah and Sarawak.

[32] In our view, the disputed sums of monies which established the cause of action in the OS, arose in Kuala Lumpur for payment of these monies were made by the plaintiff, an entity which at all materials times had its registered address in Muar, Johor and where the plaintiff's joint liquidators' offices are also located in Kuala Lumpur.

[33] Furthermore, the evidence of the receipts of payments of the said sums in the relevant Form 75 was sworn and lodged by Dato' Chong, as the liquidator of the defendant with the Companies Commission of Malaysia at Kuala Lumpur and the relevant correspondences between the parties also took place in Kuala Lumpur.

[34] As such, we agreed with the plaintiff's submission that given that the impugned payments of the sums of monies occurred in the territory of West Malaysia by reason of first, the place of business and residence of party making the payments being in Johor and Kuala Lumpur (of the respondent and its joint liquidators, respectively) and secondly, that of the party receiving the monies, Dato' Chong as the liquidator of the defendant is in Kuala Lumpur, and coupled with the key fact that the subsequent fulfilment of the requirements of Form 75 were also performed in Kuala Lumpur, it is clear that the cause of action could not have been more correctly or conveniently commenced in the High Court of Malaya, specifically in Kuala Lumpur.

[35] Premised on the above, we see no merit in the defendant's appeal on this issue. We dismissed this appeal with costs of RM10,000 subject to the payment of allocatur's fee.

Appeal 1657

[36] The issue in this appeal is whether the payments of the rentals and the forfeiture of deposits subsequent to the winding up of the plaintiff is contrary to s 223 of the CA.

[37] Enclosure 1 is an application by the plaintiff for declarations to essentially declare the forfeiture of the deposits and payment of rentals as 'void dispositions' under s 223 of the CA and for a consequential order that the appellant return the said payments to the plaintiff.

[38] In respect of the OS, the learned High Court judge found that the plaintiff has established its case for the reliefs sought in its OS, given the findings that the payments in question constituted dispositions made by the plaintiff after the commencement of its winding up contrary to s 223 of the CA.

[39] The relevant passages of the learned High Court judge judgment which is worthwhile quoting in extenso:

> [34] *The payment of rentals totaling RM681,333.33 was received from the plaintiff between 16 June 2015 and 1 October 2015, after the purported termination of the deposits were retained and forfeited by DC after the presentation of the petition against the plaintiff on 25 May 2015 and subsequent to the appointment of the plaintiff's provisional liquidators on 24 June 2015*. Therefore, at the time of payment by the plaintiff to the defendant, by way of retention of rental and forfeiture of deposits by the defendant, a petition for winding up had already been presented against the plaintiff.
>
> [35] The plaintiff was wound up on 25 February 2016, the date of the presentation of the petition became the commencement date of winding up of the plaintiff pursuant to s 219 (2) of the CA. Any payments subsequent to the commencement date, like the retention of rentals and forfeiture of deposits are therefore void under s 223 of the CA.
>
> [49] *In the instant case, the plaintiff was effectively insolvent and monies were disposed without the knowledge of the plaintiff's liquidators. No evidence had been adduced to show the existence of any benefit accruing to the plaintiff and its general creditors from the business relationship it had with the defendant, or specifically by virtue of the disposition, which appears in all likelihood utilised to have settled any debt due to the defendant instead of to the other creditors, or even to the petitioner who in the first place, obtained the winding up order against the plaintiff.*
>
> [50] I accept the respondent's submission at the time of the receipt of the rentals and the forfeiture of the deposits, the tenancy agreement had already been terminated and the plaintiff at the material time had no other business. Thus, by no stretch of imagination can it be asserted that the disposition in question was necessary for the plaintiff's continuation of business in order to benefit its general body of creditors. Furthermore, no benefits had been able received, let alone available for distribution towards satisfying the proofs of debt filed by the creditors of the plaintiff.
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> ...
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> [76] Thus, the defendant cannot conveniently argue that the transaction is just like any other ordinary landlord and tenant relationship, where the plaintiff as a tenant had an obligation to pay rents pursuant to the agreements executed, in the ordinary course of business. For these would also be the kinds of payments that every unsecured creditor of the plaintiff could seek to challenge. The test propounded by the Federal Court in *Wong Wee Kheong* must still be applied.

[40] The defendant did not dispute that the disposition of a company's property is generally prohibited under s 223 of the CA after the filing of a

winding up petition. However, the defendant stressed that the learned High Court judge fell into error in failing to consider the deposits payment were made before the filing of the winding up petition, ie in August 2014 and the winding up petition was filed only on 25 May 2015. Therefore, it was submitted for the defendant that the learned High Court judge had erred when he essentially relied on Form 75 in coming to the conclusion that the forfeiture of the deposit was made after the filing of the winding up petition and was therefore void.

[41] In this regard, learned counsel for the defendant submitted that the defendant forfeited the deposits payments to 'partly settle the outstanding rental due and owing'. The said rentals were outstanding from November 2014. As such, it was argued for the defendant that the obligations to pay the rental sums crystalised before the filing of the winding up petition.

[42] It was also contended for the defendant that the learned High Court judge erred in failing to appreciate that the plaintiff was not entitled to claim the sum of RM831,333.33 from the defendant under s 223 of the CA as the payment of the said monies were made towards the rental pursuant to a valid tenancy agreement and is not unlawful. Further, the obligation to pay that money was still existing at the time of presentation of the petition.

[43] In refuting the contention of the defendant, learned counsel for the plaintiff took the position that the forfeiture of the deposits and the payment of rentals to the defendant is contrary to s 223 of the CA and unlawful as the rentals and the deposit were retained and forfeited after the presentation of petition and the appointment of Ng and Venki as the plaintiff's provisional liquidators vide order dated 24 June 2015.

[44] We have given our utmost consideration to the submissions of both parties but we found ourselves unable to agree with the submissions of the defendant.

[45] This appeal calls for consideration of s 223 of the CA which provides:

> 223 Avoidance of disposition of property, etc
>
> *Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.*

[46] It seems to us the starting point must be an understanding of what is the purpose of s 223 of the CA. When a winding up petition has been issued, any disposition of assets made after that date is void. This can mean that payments

made by the company can be recovered by the liquidator. However, s 223 of the CA allows the court to validate such payments provided certain safeguards are met. The rationale of s 223 of the CA is to prevent the improper dissipation of the property of the company before the application can be heard (see W*alter Woon on Company Law*, Revised 3rd Ed at p 729).

[47] Coming back to the present case, as we have stated earlier, the evidence shows that the tenancy agreement was terminated by the notice dated 26 June 2015 issued by the defendant. Further, the payments of rentals totaling to RM681,333.33 were received from the plaintiff between 16 June 2015 and 1 October 2015, after the filing of the winding up petition of the plaintiff.

[48] It is not disputed by the defendant that at the time of receipt of the rentals and forfeiture of the deposits, the tenancy agreement had already been terminated and the plaintiff at all material time had no other business. Therefore, in our view, the said settlement of the rentals and forfeiture of the deposits cannot be said to be necessary for the plaintiff's continuation of business which would benefit its general body of creditors.

[49] In fact, according to Form 75 lodged on 18 February 2015 ('Account 1'), Dato' Chong acknowledged receiving a total of RM150,000 on 14 August 2014 from the plaintiff, which consisted of 'Rental Deposit' amounting to RM100,000 and 'Utility Deposit' amounting to RM50,000.

[50] Further, according to another Form 75 lodged on 13 January 2016 ('Account 3'), the defendant's liquidator acknowledged receiving monies amounting to a total sum of RM831,333.33 from the respondent between 16 June 2015 and 1 October 2015 as 'Rental of Mill'.

[51] We are of the considered view that given that the forfeiture of the rental deposit and the payment of the rentals were made after presentation of a winding up petition, it would be a 'disposition' within s 223 of the CA.

[52] It is worth repeating that s 223 of the CA addresses cases where assets legally owned by a company in winding up are disposed of. The purpose of s 223 of the CA is to ensure that at least once the winding-up procedure is started, a company's property is retrieval, in particular for the purpose of being available in order to be distributed.

[53] Under s 223 of the CA, the disposition of the property of the company after the presentation of a winding up is void unless validated by the court (see: *Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd* [1990] 3 MLJ 309; [1990] 2 CLJ Rep 253 and *Tan Kah Hoe & Anor v Budaya Adil Sdn Bhd* [2000] 7 MLJ 530; [1999] 4 CLJ 759).

[54] Learned counsel for defendant contended that s 223 of the CA did not impose any timeline when validation must be obtained and that any court could grant validation at any time citing the Court of Appeal case of *The Ayer Molek Rubber Company Bhd v Bintang-Bintang Sdn Bhd* [2013] 4 MLJ 401; [2013] 4 CLJ 820, and the Federal Court case of *Wong Wee Kheong & Anor v Daya Bersama Sdn Bhd* [2013] 3 MLJ 313; [2013] 3 CLJ 969.

[55] Recently this court had an occasion to consider a similar argument in the case of *NZ New Image Sdn Bhd v Loh Yok Liang* [2016] MLJU 1768; [2016] CLJ 474 where no validation application was made by the appellant. Delivering the judgment of the court, Idrus Harun JCA (now FCJ) held:

> In *Ayer Molek* the ratio relates to the winding up court granting a stay of winding up order pursuant to s 243 of the Act. The appellant, it is to be observed, cited *The Ayer Molek* as the authority that any court could grant validation or leave under s 223 of the Act at any time. This argument is plainly wrong because an application for validation or leave must appropriately be heard by the winding up court so that the winding up judge will have control of all such applications made before him.

[56] It ought to be noted that in this instant case, there was no application from the defendant for a validation order under s 223 of the CA. In our view without an order for validation, the learned High Court judge was right when he said, that remittance of RM831,333.33 to the defendant after the presentation of the petition of winding up, was void. This reasoning is consistent with the view expressed by the Supreme Court in *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449; [1988] 2 MLJ 449.

[57] For that reason, in our indulgence, this appeal is dismissed with cost of RM5,000 subject to the payment of allocatur. We affirmed the decision of the High Court and we agree with the learned judge who had ordered for the entire remittance must be returned to the plaintiff.

CONCLUSION

[58] Having regard to the matter set out above, we are unable to accept the appellant's arguments. The learned High Court judge did not err on the facts or in law. We therefore unanimously dismissed Appeal No W-02(IM)(NCC)-1103–06 of 2017 and Appeal No W-02(NCC)(A)-1657–08 of 2017 with costs of RM5,000 and RM10,000 respectively subject to the payment of allocator. The deposit is to be refunded to the defendant. We, therefore, affirmed the decision of the High Court judge.

Appeals dismissed and decision of High Court affirmed.

Reported by Ahmad Ismail Illman Mohd Razali